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ABSTRACT

A study examined the extent to which the violation of any one of more than 20 deleted Federal Communications Commission "underbrush" rules or policies (minor rules and policy statements) might result in a threat to the violator's broadcast license. All of the deleted policies and regulations, the criminal codes of California, Florida, New York, Texas, and Indiana, and the FCC's current character standards were examined. Results indicated that only six of the more than 20 deleted rules or policies treat activities which might lead to the types of criminal convictions now considered probative of licensee character. Results also indicated that the activities described in the other deleted policies, though possibly illegal, unethical, or poor business practice, do not rise to the level of severity that the current Commission considers relevant in judging the character qualifications of public trustees. Findings suggest that only when the Commission begins its implementation of the new character standards will a clearer picture emerge of whether anything remains of the public's interest in being served by honest and principled broadcasters. (One hundred forty-two notes are included.) (RS)

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IN SEARCH OF DEREGULATION: CONNECTIONS AMONG DELETED UNDERBRUSH POLICIES, STATE CRIMINAL LAW, AND FCC CHARACTER QUALIFICATIONS FOR BROADCAST LICENSEES

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IN SEARCH OF DEREGULATION: CONNECTIONS AMONG DELETED UNDERBRUSH POLICIES, STATE CRIMINAL LAW, AND FCC CHARACTER QUALIFICATIONS FOR BROADCAST LICENSEES

Much has already been written about the real and anticipated effects of the deregulatory program undertaken by the Federal Communications Commission during the 1980s. Discussions about the major actions of the Commission--the decision to end the enforcement of the Fairness Doctrine, the half-hearted attempts to resurrect cable television must-carry rules, changes in the multiple ownership rules, and the deletion of the three-year anti-trafficking rule--have been quite extensive, both in the popular press and in academic circles.[1]

One major deregulatory initiative undertaken by the Commission during the past eight years has not been addressed, however: regulatory underbrush. This label was given to the FCC's quite-extensive efforts to rid the agency of seemingly minor or relatively unimportant rules and policy statements that had accumulated over fifty years of regulation. Several good reasons can be advanced as to why the academic community has not addressed this mass excision of FCC regulations and policy statements. For one thing, other policy actions in themselves were probably more important and certainly more newsworthy. Moreover, many of the "underbrush" policies deleted by the FCC were not well known or politically explosive. Finally, those interested persons who did think about the FCC's program of deleting its regulatory underbrush easily might have concluded

that the whole exercise was more FCC posturing than substantive reform.

What has not been considered, and what this study intends to address, is the extent to which a broadcaster may yet jeopardize his or her license for engaging in the kinds of activities that were once prohibited by these now-deleted FCC policies. The rules and policies, when a part of the FCC's regulatory program, served as constant reminders to broadcasters as to what kinds of behavior were appropriate for a trustee of the public interest. Moreover, violations of these policies were considered by the FCC as evidence in determining whether a broadcaster's license should be renewed. Many of these policies arguably had little or no justification or public interest ramifications. Several, however, warned broadcasters to avoid activities of a more serious nature--activities which, although not stated in the policy, under state law could lead to criminal prosecution. In fact, when deleting the underbrush policies the Commission often opined that the activities were better dealt with under state law than by the Commission.

In those instances where a criminal conviction could result from such a violation, the conviction might then be considered probative of the broadcaster's qualifications to remain a licensee under the Commission's character guidelines.[2] Although the Commission's character standards are less severe than they once were,[3] the FCC still considers certain kinds of criminal convictions as evidence that a broadcaster may not be qualified

to be a licensee. Ironically, a licensee's violation of a deleted FCC regulation conceivably could cost that broadcaster its license.

PURPOSE AND DESIGN OF THE STUDY

This study was designed to determine the extent to which the violation of a deleted underbrush rule or policy might result in a threat to the violator's broadcast license. To answer this question, all of the deleted underbrush policies and regulations were studied thoroughly. Next, the criminal codes of five states were perused to determine whether the activities discussed in the now-deleted policy statements or regulations might be considered criminal activity under state law. The states of California, Florida, New York, and Texas were chosen for initial study because they provided geographical diversity plus each of these states contains a very large number of broadcasters. The fifth state studied, Indiana, while providing additional geographical diversity, frankly was chosen because it is the home state of this study's principal researcher.

After determining which activities covered under the deleted FCC policies could lead to criminal prosecution, the FCC's current character standards were consulted in an effort to divine whether such criminal activity is of a type to call into question a licensee's qualifications. This comparison of state law violations with the FCC's character standards provided the answer to the primary research question: whether violating a former

policy or rule of the Commission might be grounds for licensee disqualification.

THE COMMISSION'S CHARACTER STANDARDS

Before addressing the deleted underbrush policies, it is useful to understand the FCC's current thinking about the violation of law and how such violations affect an entity's qualifications for being a licensee. The goal of the FCC's character guidelines for broadcast licensees is to insure that licensees will deal truthfully with the commission and comply with the Communications Act and the commission's rules and policies with minimal oversight from the FCC. Accordingly, in applying its character requirements, the commission delves into activities that reflect on a licensee's truthfulness and reliability.[4]

Specifically, the types of activities that the Commission will consider as probative of a licensee's truthfulness and reliability fall into two main categories: non-FCC related behavior and FCC-related behavior. Both of these categories and the various subcategories of character-probative activities will be discussed individually.

In general, the Commission does not believe that non-FCC violations of law have a clear enough nexus with the future lawful operations of a broadcast station to consider such violations as relevant to character qualifications.[5] However, the Commission will consider three types of adjudicated misconduct not specifically proscribed by the Communications Act[6]

or the FCC's rules[7], which it considers predictive of the character traits of truthfulness and reliability. The first involves fraudulent misconduct before a government agency. The Commission states that specific findings of fraudulent misrepresentations to other governmental units may indicate a similar propensity to engage in such behavior in the perpetrator's dealings with the FCC.[8]

The second subcategory of non-FCC misconduct that the FCC will consider in deciding the character qualifications of broadcast licensees is certain criminal convictions. In general, the Commission will consider only criminal convictions involving false statements or dishonesty.[9] Other serious crimes not involving false statements or dishonesty will only be considered if it can be demonstrated that there is a "substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies."[10] Furthermore, the Commission will consider only felony convictions in this category of non-FCC misconduct.[11]

With respect to the violation of anticompetitive and antitrust laws, the FCC states that "... anticompetitive activity in the nonbroadcasting context may not be predictive of an applicant's proclivity to be truthful and reliable."[12] Thus, no consideration will be given to nonbroadcast related violations of anticompetitive or antitrust laws. However, the Commission will consider for character purposes broadcast-related business misconduct that rises to the level of an adjudicated violation of

anticompetitive or antitrust laws.[13] The Commission itself will not conduct investigations nor will the agency seek to enforce such statutes.[14]

The second major category of activities that the Commission will consider in judging the character qualifications of licensees involves FCC-related violations of law. This category includes such activities as violations of the Communications Act and the Commission's rules, misrepresentation or lack of candor to the Commission, and abuse of the agency's processes.[15] These activities have little relevance to this study because violations of most of the deleted underbrush policies would now be considered non-FCC related activities.

This brief overview of the Commission's character standards provides a guidepost for determining what types of activities the Commission will consider in judging a broadcaster's character. Accordingly, in studying the deleted underbrush policies and the state criminal codes, only specific types of criminal activity need be considered. These activities generally fall within the non-FCC category of wrongdoing, specifically criminal convictions involving "false statements and dishonesty", and certain felony convictions where there is a substantial nexus between the criminal activity and the licensee's proclivity for truthfulness and reliability. These are the kinds of state-law convictions that could lead to a licensee's disqualification on character grounds.

THE DELETED UNDERBRUSH POLICIES

The Federal Communications Commission under the Chairmanship of Mark Fowler began its formal review of underbrush policies with the issuance of a Policy Statement and Order in the summer of 1983.[16] Over the next two years the Commission deleted over twenty policy statements covering everything from ratings distortions and fraudulent billing to the broadcast of astrology information and siren sound effects.

The reasons given for deleting these policies often varied with the particular policy under consideration. However, several general patterns emerged from the Commission's orders regarding its motivations for undertaking this underbrush project. These arguments typically fell into four categories: the policies affected a broadcaster's choice of program content, thus violating rights protected by the First Amendment to the United States Constitution; the cost of the policies in terms of agency oversight and broadcaster self regulation outweighed any benefits of retaining the policy; other entities were better positioned to enforce particular policies; and, the policies were simply wrong headed to begin with.[17]

Perhaps the Commission's best attempts at explaining its decisions came in the second underbrush order. With respect to the First Amendment argument, the FCC opined that policies cautioning broadcasters about content raised "fundamental questions concerning the constitutional rights and editorial freedoms of broadcast licensees".[18] The Commission noted that

the policies did not receive much, if any, First Amendment treatment when they were effectuated, and that none had undergone First Amendment scrutiny in court cases. The FCC concluded that the policies with content ramifications in fact restricted the First Amendment rights of broadcasters without providing any concomitant public interest justifications.

In the analysis of costs and benefits of the policies, the Commission asserted that costs were evident throughout the FCC's processes. The policies generated complaint letters and investigations and became issues in comparative hearings and renewals. Accordingly, the Commission concluded that the policies resulted in an "imprudent use of FCC resources" with little or no benefit to the consuming public.[19] In fact, the Commission recognized little or no benefits of the policies; they were likely to "reduce consumer well being and place undue costs on broadcasters, either indirectly through the elimination of desired programming or directly through elimination of advertising revenue."[20]

The notion that remedies and forums other than those provided by the FCC are more appropriate for resolving underbrush-type problems is a constant theme throughout the Commission's orders. Often the Commission avers that the activities covered by certain policies would be better handled through private litigation or under state criminal law.[21] Because the Commission's reasoning is often individually tailored to specific issues, these arguments, along with the FCC's oft-

stated notions that the policies were misguided from their inceptions, will be addressed within the context of the discussion of individual policies.

The Commission's first underbrush order treated two of its policies: distortion of ratings and the use of inaccurate station coverage maps.[22] The policy against ratings distortions, first stated in 1963,[23] obliged broadcasters to act responsibly in the use of ratings data and to ensure the validity of survey material utilized in advertising campaigns. The policy involved the inappropriate use of data--either the misleading use of accurate data or the use of known invalid or inaccurate data.[24] In many instances, the FCC referred ratings distortion complaints to the Federal Trade Commission for consideration, but occasionally the FCC would evaluate such complaints independently.[25]

In expunging the ratings distortion policy, the Commission noted that detailed audience ratings data was readily available to radio and television stations, advertisers, and advertising agencies. These entities, opined the Commission, were in a particularly good position to verify the accuracy of ratings claims and decide for themselves the significance of stations' claims.[26] The Commission continued that, as with all business relationships, commercial entities have a strong incentive to deal with each other candidly, and that legal recourse against an offending station was available to a defrauded party. Given the non-regulatory methods of dealing with ratings abuse, and the

commercial nature of the conduct, the Commission concluded that continued FCC oversight of this activity was not warranted.[27]

Similar reasoning was used in the Commission's decision to delete its policy against the use of inaccurate and exaggerated station coverage maps or any practice intended to deceive or mislead advertisers or the public.[28] The Commission noted that the primary issue was a business relationship and that independent verification of stations' claims as well as private legal remedies were available. Accordingly, the FCC stated that it no longer would investigate or adjudicate complaints involving misleading coverage claims by licensees.[29]

The Commission's next foray into clearing the regulatory underbrush involved the deletion of several program content policies.[30] The first such policy stated that advertising alcoholic beverages in "dry" areas of the country was not in the public interest because such advertisements might violate state law and may raise questions about airing programs of limited audience appeal.[31] In deleting the policy, the FCC believed it was susceptible to misinterpretation--it was not a flat ban--and that there was no reason to intervene in programming decisions based on limited audience appeal. The Commission concluded that other forums had a more direct interest and greater expertise in this issue, and that local courts were more appropriate to determine violations of local law.[32]

The Commission next addressed its policy on the broadcast of astrology material which "inherently raises questions of false or

misleading advertising claims."[33] When this policy was announced, the FCC averred that it would be concerned "... if the services of a fortune teller, astrologer or persons offering services of a like nature, were presented by a broadcaster so as to guarantee or promise monetary, health or other benefits." [34] In deleting the policy, the Commission stated that the policy overreaches and could be misconstrued as a total prohibition. Moreover, other remedies such as civil suits for fraud and damages for breach of contract, as well as FTC or state prosecution for false and misleading advertising, were available to injured parties.[35]

The Commission next turned to its policy on the broadcast of foreign language programs.[36] This policy required licensees to have knowledge of the content of foreign language programming. The Commission did not mandate a particular method for monitoring the content of such programming, but it did suggest the use of paid monitors.[37]

In deleting this policy, the FCC analogized the broadcast of foreign language programming to a network affiliate's broadcast of network programming. Network affiliates typically have not pre-screened network material and the affiliates usually are not aware of specific content. Yet, there is no screening requirements for network affiliates. While maintaining that all licensees are responsible for the content of programs they broadcast, the Commission rescinded its policy statement that imposed special monitoring obligations on foreign language

programming. The Commission recognized that the ultimate responsibility for the programming broadcast over a licensee's station remained the same; however, rescinding the policy gave licensees' greater discretion in fulfilling their obligations.[38]

The next policies targeted for deletion were ones dealing with various forms of harassment. The first was a fairly straight-forward policy against encouraging listeners or viewers to make harassing or threatening phone calls.[39] The second policy was directed at broadcasts which were intended to further the private interest of the licensee and which had the effect of annoying and harassing others.[40]

With respect to the first policy, the FCC said this was an example of overly broad regulation where the FCC should never had acted in the first place. The Commission opined that "the line between harassing phone calls and legitimate, broadly felt expressions of disapproval can be fine indeed."[41] Similarly, with regard to the second policy, the FCC stated that the line between a broadcaster's private interests and the interests of the public often converges and that the agency should not discourage broadcasters from contributing to such discussion.[42] The Commission saw no need for a uniform federal policy, especially given the existence of alternative remedies including civil suits alleging invasion of privacy and federal and state laws that make harassing calls a criminal offense.[43]

Music format service agreements were the subject of another policy deleted by the agency. At the time of its adoption, the

FCC was concerned that licensees were abdicating their programming responsibilities by contracting with music format services; any agreement that unduly fettered the free exercise of independent programming judgement was contrary to the public interest.[44] In abandoning this policy, the Fowler Commission stated that the retention of such a strict policy was inconsistent with the goal of reducing the regulatory role of the FCC. The marketplace, according to the Commission, should play an important role in regulating such matters.[45]

The policy against the repetitious broadcast of musical recordings also came under the FCC's scrutiny.[46] In rescinding this policy, the agency noted that at first glance it appeared innocuous, but upon closer examination the policy raised serious questions about government encroachment into editorial judgement. Finding that the airing of repetitious broadcasts violated no law, the FCC said that retention of the policy was inconsistent with the goal of placing more reliance on licensee discretion and the competitive marketplace. The Commission concluded with the statement that any station "... seeking to utilize repetitious broadcasts would be totally free to do so, and listener and advertiser reaction should then quickly determine the wisdom thereof."[47]

The policy against reporting the results of polls without specifying the nature of the poll and whether it was conducted scientifically addressed the problem that radio polls often were inaccurate due to bad sampling and the susceptibility of

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The policy against reporting the results of polls without specifying the nature of the poll and whether it was conducted scientifically addressed the problem that radio polls often were inaccurate due to bad sampling and the susceptibility of

manipulation by small well-organized pressure groups.[48] Upon reconsideration, the FCC believed that deleting the policy would have little practical effect. Because of the increased use and reporting of polls, the public was more sophisticated about their limitations; the Commission thought that the public was unlikely to take poll results literally and without qualification. Also noted was the opinion that if one broadcaster reported false or unscientific polls, other media would report that fact. Accordingly, the policy was deleted.[49]

The second underbrush document concluded with the rescission of a policy characterized as "certainly among the Commission's most trivial."[50] This was the policy against the use of sirens or other emergency sound effects in broadcast announcements. At its adoption, the FCC was concerned that such sounds could be confused with actual emergency sounds which might cause confusion or accidents among listeners.[51] Finding that this policy might unduly restrain creative advertising, and that the general public interest standard is a sufficient check against the misuse of sound effects, the FCC deleted the policy.[52]

The Commission's next underbrush opinion covered three related policies dealing with the transmission of horse racing programming.[53] These policies prohibited such practices as broadcasting a full slate of races, giving out detailed prerace information, and announcing results and prices paid before the next race. The Commission cited several reasons for deleting the horse racing policy, including the notion that the prohibition

was an unjustified interference with licensee discretion. Sections of the United States Criminal Code that would allow the Justice Department to prosecute anyone using interstate broadcasting to assist in violating the law also were mentioned as grounds for rescinding this policy.[54]

Several primarily business-related policies were addresses and deleted in the next underbrush deregulation order in 1985.[55] The first of these policies involved ratings distortions; licensees were discouraged from attempting to distort audience ratings by furnishing false information to an audience rating service or by improperly influencing the recipients of survey diaries.[56] Upon deciding that listeners and viewers were unaffected by these practices and that enforcement was an unjustified expenditure of scarce agency resources, the FCC rescinded the policy. Several alternative remedies were cited in support of this action: ratings services can throw out distorted diaries or can publish alerts, advertisers would "likely look askance" at stations accused of distorting ratings, competing stations could police such activities, and civil litigation or complaints to the Federal Trade Commission are available.[57]

Two kinds of conflict of interest policies next were taken up by the agency. The first stated that licensees must exercise special diligence to prevent station employees from influencing program content, including commercial messages, to advance their outside interests.[58] This policy was seen as unnecessary because to some extent it was redundant with sections of the

Communications Act prohibiting payola and plugola,[59] and the FCC felt that the marketplace should correct any abuses through pressure from the audience and advertisers.[60]

The second conflict of interest policy concerned sports announcer selection. Adopted in 1974 in response to allegations that sports announcers employed by the teams they cover may engage in bias and misrepresentation, the policy required disclosure during each event of an arrangement by which announcers are employed or approved by any party other than the licensee or network.[61] The Commission found that this policy did not benefit the public, and that the marketplace, either through fans turning off offending broadcasts or reports in competing media, could correct any abuses that might occur.[62]

Two policies dealing with the improper use of a broadcast station also were treated in the fourth underbrush order. The first of these policies concerned the promotion of a licensee's non-broadcast businesses. Essentially this policy required the licensee not to discriminate in dealings with those who compete with the non-broadcast businesses of the licensee and to disclose any significant interests in matters on which the station had editorialized.[63] The policy was jettisoned in the belief that to the extent licensees engage in anti-competitive behavior, such activities are better handled by appropriate agencies charged with enforcing the anti-trust laws.[64] For similar reasons, a related policy against using a broadcast station for personal advantage in other business activities was removed.[65]

Never an agency to condone lying to the public, the FCC established a policy against broadcasters indicating that the stations are co-sponsors of concerts if in fact they are not.[66] The Commission's rationale for deleting this admonition against prevarication included the assertions that violation of the policy caused no harm to the public, that the FTC is better situated to regulate misleading advertisements, and that sponsoring stations, promoters, and performers all have recourse to private legal actions against the offending station.[67]

The policy against failure to perform sales contracts was meant to discourage the practice of selling a package of spots with prepayment and subsequently not airing all the spots.[68] The FCC repealed this policy because advertisers with a complaint against a station could seek private remedies for breach of contract.[69]

The Commission closed its fourth underbrush order with a discussion of the policy relating to the airing of false, misleading, and deceptive advertising. Allowing that the broadcast of an advertisement determined by the FTC to be false or deceptive would raise serious public interest questions about the licensee, the Commission's policy charged licensees with screening ads before airing and exercising particular care in deciding to broadcast an ad which had been the subject of an FTC complaint.[70]

Finding this policy unduly burdensome, the FCC deleted the policy because other corrective actions were available, including

FTC enforcement and private review by consumer and industry groups. The Commission also cited the existence of state and federal statutes covering fraud and misleading advertising as further justification for rescinding its policy.[71]

The Commission's fifth underbrush order dealt with only one policy.[72] This policy cautioned licensees against contests and promotions that might lead to various harmful results, including harm to private property, traffic congestion or public disorder, invasions of personal privacy due to use of telephones, or harm to the public through scare tactics.[73] This policy was deleted because, according to the Commission, it restricted editorial discretion without advancing the public interest. Aggrieved citizens had alternative avenues of redress, including civil actions in trespass or invasion of privacy and criminal prosecutions for disturbing the peace or public nuisance.[74]

The sixth and final underbrush order concerned two policies related to a licensee's business practices.[75] The first prohibited fraudulent billing and network clipping: fraudulent billing involves misrepresenting to an advertiser or ad agency the cost of a spot or the number of times an advertisement has been run; network clipping is the practice whereby licensees falsely certify to a network that network programming material has been run.[76]

While acknowledging that these were fraudulent and undesirable practices, the FCC nevertheless deleted the policy due in part to the scarce resources of the Commission, which

stated that the public would benefit "... as the FCC is able to redirect its scarce enforcement resources to more urgent matters."[77] Enforcement by the Commission was not warranted due to the ability of those private interests being harmed to bear the burden of finding and correcting abuses. Moreover, other remedies were available such as private actions for breach of contract and reliance on state fraud, racketeering and antitrust statutes.[78]

The final bit of underbrush cleared away by the Commission was a four-part policy dealing with combination advertising rates and joint sales practices.[79] In general, this policy forbade licensees from engaging in anticompetitive-type behavior that tied advertising rates for one station to those of other stations.[80] The Commission deleted this policy after concluding that it was not appropriate for the FCC to prohibit conduct that is not absolutely forbidden by antitrust laws. The practices were not inherently anticompetitive, and in fact the Commission opined that there may be benefits arising from certain combination rates. Those practices that were deemed anticompetitive could be more appropriately dealt with by enforcement through the Justice Department or the FTC or by private antitrust suits.[81]

In a little over two years, the Commission excised from its rules over twenty broadcast policies. These policies for the most part had been developed in response to specific complaints or abuses brought to the Commission's attention over the years.

They served as constant reminders to broadcast licensees of the seemingly "little things" that could be considered as breaches of the public trust. As was noted many times in discussing these policies, the Commission often justified deleting these policies because other remedies--including state criminal prosecution--were available. These activities will now be analyzed in terms of whether they might rise to the level of state criminal activity. Following this analysis, a determination will be made as to whether any criminal convictions for these activities would be considered by the FCC in judging the character qualifications of the convicted licensee.

STATE CRIMINAL CODES AND UNDERBRUSH ACTIVITY

For the purposes of this research, which is intended to determine the extent to which engaging in the activities covered by the now-rescinded policies violates state law, the deleted underbrush policies may be separated into several categories. One category of policies includes those that were relevant only to the Commission and have no remedial importance outside the sphere of FCC decision making. These are policies which cover activities that would matter, if at all, only to the Commission; states would have no particular reason to legislate in these areas. This category includes the policies against the repetitious broadcast of music recordings,[82] the broadcast of foreign-language programming,[83] and the broadcast of call-in poll information.[84] Also included in this category is the policy

against entering into certain kinds of music format agreements.[85] These policies, because they deal with broadcast activity that would concern only the Commission, can be dropped from further consideration. None of these activities find expression in state criminal codes.

A second group of policies which need no further consideration are those the violation of which would result only in private civil litigation or which involve ethical, as opposed to legal, questions. The activities covered under these policies do not violate state criminal laws, but might lead to breach of contract litigation. Such litigation is not considered by the FCC in judging a licensee's character qualifications.[86] These policies include admonitions against the failure to perform sales contracts[87], announcements regarding the selection of sports announcers[88], and the exhortation against lying about concert sponsorship.[89]

Activities that, if punishable, would be covered only by federal and state antitrust or anticompetition statutes represents a third group of policies needing no further analysis for the purposes of this study. The FCC has made it quite clear that broadcast-related violations of antitrust and anticompetition laws will be considered in judging a licensee's character qualifications.[90] The policies falling into this category include those covering combination advertising rates and joint sales practices,[91] and those addressing the use of the

station to promote or advance the non-broadcast interests of licensees or station employees.[92]

The remaining group of policies does require further analysis. The activities covered by these policies were found to have cognate provisions in several state criminal codes. The remaining policies fall into three distinct groups: one group dealing primarily with fraudulent activity, one group that concentrates on harassment or breach of the peace, and a final group focusing on specific activities that states traditionally have regulated. Each of these sets of policies will be addressed in turn.

Four of the Commission's deleted underbrush policies deal with fraudulent or misleading business practices. One involves the use of inaccurate or exaggerated station coverage maps with the intent to deceive or mislead advertisers or the public.[93] Another deals with fraudulent billing and network clipping.[94] The third and fourth cover various aspects of ratings fraud.[95] All five of the states surveyed had various criminal code provisions that could be used to punish these types of activities.[96]

Although worded differently, all five states have criminal code provisions prohibiting larceny or theft.[97] Theft essentially is the unauthorized taking of another's property. Theft can occur in several ways, however, and one way common to all of the five state statutes under review involves the use of fraud or deception. For example, the California statute states

that every person who "by any false or fraudulent representation or pretense, defrauds any other person of money" is guilty of theft.[98] The New York statute defines larceny as the wrongful taking or obtaining of another's property (including money) which includes obtaining property by false pretenses.[99]
In addition to the traditional theft statute, Florida has enacted a law whereby anyone who engages in a scheme to defraud (defined as a systematic, ongoing course of conduct) and obtains property pursuant to that scheme is guilty of "organized fraud".[100]

The ex-FCC policies on inaccurate coverage maps, fraudulent billing and network clipping, and the misleading use of ratings data describe activities that easily could fall under all of the state theft or larceny statutes. The once-proscribed activities involve the defrauding of advertisers or networks with the goal of receiving more money than the perpetrators are entitled to. Depending on the amounts of money obtained by these fraudulent means, licensees engaging in these activities could be charged and convicted of felonies under state penal law.[101]

The policy against deliberately distorting ratings does not fall under the definitions of theft or larceny because the act of distorting, in itself, does not involve the fraudulent exchange of money or property. However, two of the states studied have criminal provisions that in fact could cover the distortion of ratings as well as the use or possession of inaccurate coverage maps.[102] The Indiana code contains a section on "deception" which includes using or possessing for use a false weight or

measure or other device for falsely determining or recording the quality or quantity of any commodity.[103] Likewise the Texas code describes a deceptive business practice as the knowing or reckless use, sale, or possession of a false weight or measure or any other device for falsely determining or recording any quality or quantity of goods.[104] In both states these criminal offenses are classified as misdemeanors.

The next set of rescinded FCC policies to be compared with state criminal laws concerned some form of physical harm or disruption. The first involved the policy against broadcasters urging viewers and listeners to call someone on the telephone for purposes of harassment.[105] The second warned broadcasters against the broadcast of sirens or emergency sound effects that might cause confusion and accidents.[106] The third was the admonition that licensees should not conduct contests and promotions leading to harmful results such as damage to private property or public disorder.[107]

All five states surveyed have criminal provisions pertaining to harassing telephone calls. However, the provisions vary in scope and application. The laws of California and Indiana proscribe the <u>making</u> of telephone calls with an intent to harass.[108] Thus, a broadcaster who urges others to call would not fall within the ambit of these statutes; only the callers could be charged.[109] The relevant statutes in Florida, New York, and Texas are broader in scope. The Florida and Texas statutes include not only the makers of harassing calls, but also anyone

who causes the making of harassing calls.[110] In New York anyone who engages in a course of conduct which alarms or seriously annoys others and which serves no legitimate purpose is guilty of harassment.[111] Therefore, engaging in the type of activity once proscribed by the FCC's telephone harassment policy could lead to criminal prosecution in three of the surveyed states.

The broadcast of sirens and emergency sound effects would require some bizarre supporting facts before such activity would be considered criminal activity in the five states surveyed. All five states make the false reporting of an emergency or the causing of a false alarm a punishable misdemeanor.[112] Presumably, the mere broadcast of a siren or alarm sound effect would not rise to the level of false reporting. However, if a broadcaster aired an alarm intending to make people believe there was an emergency and thus set off additional alarms, this might be considered "causing" a false alarm, which would be punishable under the state laws. Absent such unusual facts, it is safe to say that engaging in the activity once covered by the FCC policy against airing emergency sound effects would not violate state criminal law.

The Commission's policy on certain kinds of contests and promotions--treasure hunts, for example--was designed to warn broadcasters about the possible harmful results that could lead from such contests.[113] The policy was dropped in part because the Commission thought that better remedies were available in civil actions or criminal prosecutions against disturbing the

peace or public nuisance. All five states have such statutes within their criminal codes.[114] These statutes classify as criminal behavior activities such as making an unreasonable noise after being asked to stop, disturbing lawful assemblies, obstructing vehicular traffic or pedestrians, or creating hazardous or physically offensive conditions. Thus, a station that knowingly or recklessly creates such a condition would be subject to criminal prosecution, although all of the statutes classify these infractions as misdemeanors.[115]

The final three defunct policies to consider involve programming content on topics in which states historically have taken a strong regulatory interest. These areas involve alcoholic beverages, horse racing (or, more generally, gambling), and false advertising. The related FCC policies are the policy against alcoholic beverage advertising in dry areas of the country,[116] the policy on horse race programming,[117] and two policies involving false, misleading, or deceptive advertising. These two policies include the one directly addressing false, deceptive, and misleading advertising, plus the policy against the broadcast of astrology material, which the FCC said inherently raised questions of false or misleading ad claims. [118]

None of the states surveyed had criminal laws covering broadcast advertising of alcoholic beverages. The alcoholic beverage codes of those states typically contained regulations on the placement of on-site advertising, but again, none of them directly addressed advertising such products on broadcast

stations.[119] Accordingly, in none of the five states surveyed would the broadcast of alcoholic beverage advertisements result in criminal prosecution.[120]

All of the states surveyed except New York had criminal provisions dealing with the transmission of horse racing, or more generally gambling, information. These provisions typically fall into two categories. The first, exemplified by statutes in the California, Florida, and Texas codes, appears to be concerned with the transmission of information to persons known to be engaged in illegal operations.[121] Under these types of provisions, the transmitter of the information must know that the information will be used for illegal purposes.

The second type of provision is broader in focus and is intended to cover the transmission of any type of information that could be used in gambling. The knowledge or intent of the transmitter regarding the use to which the information will be put is irrelevant. This type of statute appears in the codes of Florida and Indiana.[122] Broadcasting this kind of programming in these states could lead to serious consequences, as both statutes treat the transmission of gambling information as felonies.[123]

The final policies to be considered involve the broadcast of false, deceptive, or misleading advertising.[124] All of the states surveyed have general Printer's Ink statutes prohibiting the dissemination of known false, misleading or deceptive advertising.[125] In all instances, however, culpability under the statute attaches only if the transmitter of the advertisement

knew that the ad was false, misleading, or deceptive. In fact, the California, Florida, and Texas statutes have specific exemptions for broadcast stations that broadcast such advertising in good faith and without the knowledge that the ad was false, misleading, or deceptive.[126] Accordingly, under all of these statutes a broadcaster would not be criminally liable unless the licensee had knowledge that the advertisements were of the type that were prohibited.

Of the more than twenty policies deleted by the Commission in its underbrush proceedings, only eight cover activities that might, under certain conditions, violate state criminal laws. With respect to business practices, these include the two ratings distortion policies, the policy against fraudulent billing and network clipping, and the admonition against the use of inaccurate coverage maps. Activities harmful to individuals or property were addressed by the policies against harassing or threatening telephone calls and contests or promotions that could lead to accidents and damage to property. The two content-specific policies that have cognate state criminal provisions are the ones treating horse racing information and false, misleading or deceptive advertising. The next step in this analysis involves a determination of whether these activities and their cognate state criminal laws represent the types of criminal behavior that the Federal Communications Commission will consider in judging the character qualifications of broadcast licensees.

STATE LAW VIOLATIONS AND FCC CHARACTER STANDARDS

To reiterate, the FCC will consider certain criminal convictions as probative of a broadcaster's qualifications to be a licensee.[127] Specifically, the Commission will consider those criminal convictions involving false statements or dishonesty[128] and felony convictions not involving false statements or dishonesty where it can be shown that there is a relationship between the conviction and the applicant's proclivity for truthfulness and compliance with the Commission's rules.[129] Thus, any convictions under the state laws discussed previously must fall into one of these two categories before the FCC will take cognizance of the wrongdoing for purposes of determining a licensee's character.

Activities such as fraudulent billing, network clipping, and the use of distorted ratings result in the unearned receipt of monies under false pretenses. All of these actions could be prosecuted under the theft statutes of the five surveyed states.[130] A conviction under the theft statutes for these types of activities, being a conviction involving false statements or dishonesty, falls squarely into one of the categories of crimes that would be cognizable under the Commission's policy on character standards.[131] Moreover, because these activities do involve false statements or dishonesty, it would be irrelevant whether the infraction was classified as a felony or misdemeanor; all convictions involving this kind of fraudulent activity are recognized.[132] Similarly, any convictions under the statutes

prohibiting the use of false measures[133] would be considered under the character guidelines.

The making or causing the making of harassing or threatening phone calls does not inherently involve false statements or dishonesty. Additionally, the criminal codes in all five states define the crime of harassment as a misdemeanor. Accordingly, conviction under these harassment statutes would not be the type of conviction that the Commission would consider in making character judgments. The criminal activity does not involve false statements or dishonesty, nor is it the type of serious offense (felony) that the FCC otherwise might consider.[134]

For similar reasons, convictions under state nuisance or breaching the peace statutes would not be considered under the character guidelines. The activities that might prompt prosecution under such statutes--a contest resulting in traffic jams or accidents, for example--do not involve false statements or dishonesty. Further, none of the five states surveyed defines these offenses as felonies.

The transmission of certain kinds of horse racing or gambling information is a crime in four of the surveyed states.[135] Nothing inhering in such transmission, however, involves false statements or dishonesty. Thus, to be considered under the FCC's character guidelines, the crime must be a felony and the Commission must be convinced that ". . . there is a substantial relationship between the criminal conviction and the

applicant's proclivity to be truthful or comply with Commission's rules and policies."[136]

In Florida, Indiana, and Texas, illegally transmitting gambling information is a felony.[137] Thus, the first of the Commission's qualifications on considering this type of offense is met. The second part of the test, showing a "substantial relationship" between the conviction and the applicant's truthfulness and compliance with FCC rules, is a factual question that would have to be proven in the course of an administrative hearing. If such a relation could be demonstrated, a conviction under the horse-racing information statutes would be considered by the Commission as probative of an applicant's character qualifications.[138]

Finally, by their very nature, the crimes of false, misleading, and deceptive advertising involve false statements and dishonesty. Convictions for such activities under state laws would be considered by the FCC in judging the character of its licensees.[139]

CONCLUSION

Just a few years ago a broadcaster engaging in the activities described in any of the Federal Communications Commission broadcast policies ran the risk of having those activities used against him or her in a licensing hearing as evidence of bad character.[140] As described throughout this paper, many of these activities no longer violate official

Commission policy. Thus, engaging in these activities are considered by the FCC only to the extent that they would result in certain kinds criminal convictions.

Of the more than twenty broadcast policies analyzed in the course of this research, only six treat activities which might lead to the types of criminal convictions now considered probative of licensee character. Four of these deal with fraudulent business practices that could lead to convictions under theft or larceny statutes, one concerns the transmission of horse racing information, and the sixth involves false, misleading, or deceptive advertising. Activities described in the other deleted policies, though possibly illegal, unethical, or poor business practices, do not rise to the level of severity that the current Commission considers relevant in judging the character qualifications of public trustees.[141]

To a certain extent, one of the theoretical foundations of federal deregulation has found support in this study. Clearly, other legal remedies--including state criminal prosecution--do exist for many of the activities once proscribed or condemned by the Commission. The irony in this finding, of course, is that, though licensees may be held accountable in other forums, in most instances such wrong doing can be accomplished without fear of placing the broadcaster's license in jeopardy.

With respect to those adjudications that the Commission states will be considered in judging a licensee's fitness, it remains to be seen whether the Commission's actions will speak

with the same force as its words. For the most part, the FCC has not had much experience with its new character guidelines. This is partially a result of Congress' action in lengthening radio and television license terms to seven and five years, respectively.[142] Most television and radio licenses were last renewed in the early 1980s, before the Commission amended its character guidelines. These licenses are now up for renewal and the Commission presumably will be forced to confront these character issues in the renewal context once again.

One effect of the Commission's underbrush deregulation has been to redefine the types of activities that can be considered FCC-related misconduct; in this arena, the Commission clearly has accomplished some deregulation. Another outcome, as evidenced by this research, is the clear delineation of the kinds of activities in which licensees must not engage without calling their character qualifications into question.

On paper, the FCC's underbrush initiatives coupled with the revised character standards have met the Commission's goals: licensee's certainly are much freer to engage in once-prohibited activities. The questions surrounding the Commission's implementation of its new character guidelines regarding the extent to which engaging in activities once--but no longer--proscribed by the FCC may be used against the licensee as evidence of bad character, remain to be answered. Only when the Commission begins its implementation of the new character standards will a clearer picture emerge of whether anything

remains of the public's interest in being served by honest and principled broadcasters.

Endnotes.

1. A review of the academic literature reveals 93 articles that have been written since 1984 in law journals alone about some aspect of FCC deregulation.

2. Policy Regarding Character Qualifications for Broadcast Licensees, 102 FCC2d 1179, (1985), recon. denied, 1 FCC Rcd. 421 (1986) (hereinafter cited as Character Qualifications). The Commission has determined that nothing in the Communications Act requires it to conduct an inquiry into a licensee's character. Rather, it is one element that the FCC chooses to consider under the broad public interest standard to determine the fitness of federal licensees. Character Qualifications at 1185-1191.

3. See Uniform Policy on the Violation of Laws of the USA by Station Applicants, 42 F.C.C. 399 (1951).

4. Character Qualifications at 1190-91. In the past, the commission considered just about any violation of law or even allegations of illegal activity in judging the character of broadcast applicants. Examples of the types of misconduct the FCC used to consider include NLRB findings of failure to bargain, a 10% shareholder's non-payment of rent, violations of the Tariff Act by importing 3 horses without paying the duty fee of $19.50, and unadjudicated violations of the wage and price freeze. Id. at 1194, n. 33.

6. Character Qualifications at 1193-95.

6. Communications Act of 1934, as amended, 47 U.S.C. Sections 1 et seq. (1980).

7. 47 C.F.R. Sections 1 et seq. (1988).

8. Character Qualifications, 102 FCC2d at 1196.

9. Id. at 1196-98.

10. Id. at 1197. The FCC states in making this threshold determination it will consider such issues as the nature of the crime, its nearness or remoteness [in time] and whether the individual has been rehabilitated. Id. at n. 42.

11. Id.

12. Id. at 1200.

13. Id. at 1201-02.

14. Id. at 1202-03.

15. Id. at 1208-1214.

16. Elimination of Unnecessary Broadcast Regulation, 54 R.R.2d 705 (1983). (hereinafter cited as Underbrush I).

17. Underbrush I at 706; Elimination of Unnecessary Broadcast Regulation and Inquiry into Subscription Agreements, 54 R.R.2d 1043, 1047-48 (1983) (hereinafter cited as Underbrush II).

18. Underbrush II at 1048.

19. Id. at 1047.

20. Id.

21. See, e.g., Underbrush I, 54 R.R.2d at 708 (private legal remedies available against stations that provide inaccurate station coverage maps); Underbrush II, 54 R.R.2d 1043 (state law courts more appropriate forum for judging the propriety of alcoholic beverage advertisements on radio and television).

22. Underbrush I, 54 R.R.2d 705 (1983).

23. 1963 Public Notice (FCC 63-544). This Notice was issued in response to hearings held by the Special Subcommittee on Investigations of the House Commerce Committee and through complaints filed at the FCC. Underbrush I at 706. The policy was noted at Section 73.4035 of the Commission's rules, 47 C.F.R. Section 73.4035 (1983).

24. Underbrush I at 706. Another policy dealing with the actual distortion of ratings data, as opposed to the use of distorted data, is discussed below. See the text accompanying notes 55-56, infra.

25. Id. at 707.

26. Id.

27. Id. The Commission did note that all future complaints would be forwarded to the Federal Trade Commission. Any adverse findings made by the FTC would be considered by the FCC in determining whether a licensee was acting in the public interest. This kind of administrative finding would be relevant under the Commission's current character guidelines. See Character Guidelines, 102 FCC2d at 1200-1203.

28. This policy was first announced in Universal Communications of Pittsburgh, Inc., 74 FCC2d 617 (1969), and was noted at Section 73.4090 of the Commission's rules, 47 C.F.R. Section 73.4090 (1983).

29. Id. at 708.

30. Underbrush II, 54 R.R.2d 1043 (1983).

31. This policy originated with Letter to Senator Edwin C. Johnson, 43 FCC 446 (1949), and was noted at Section 73.4015 of the Commission's rules, 47 C.F.R. Section 73.4015 (1983).

32. Underbrush II at 1050-51.

33. Id. at 1051. This policy was the subject of a declaratory ruling issued in response to a complaint by an author of a book on astrology who complained that a station would not broadcast certain material. Alexandra Mark, 34 FCC2d 434 (1972). The policy was noted at Section 73.4030 of the Commission's rules, 47 C.F.R. Section 4030 (1983).

34. Underbrush II at 1051.

35. Id. at 1051-52.

36. See Foreign Language Programs, 39 FCC2d 1037 (1973). This policy was referenced at section 73.4105 of the Commission's rules. 47 C.F.R. Section 73.4105 (1983).

37. Underbrush II at 1052-53.

38. Id. at 1053-54.

39. This policy was instituted when a station employee broadcast the name and telephone number of a person and told listeners to call the person. The Commission at the time stated that such conduct raised serious questions about the public interest responsibility of the licensee. Dewey M. Duckett, Jr., 23 F.C.C.2d 872 (1970). The policy was listed at section 73.4120 of the Commission's rules, 47 C.F.R. Section 73.4120 (1983).

40. This policy resulted from a situation where a station wanted to move its transmitter tower to the top of the New York World Trade Center, but was denied permission. The station then told viewers with reception problems to call a particular official at the New York Port Authority to complain. The official's name and telephone number were given over the air. The Commission stated that the station was using its facilities to advance private interests and that its actions were calculated to cause the harassment of a public official and to interfere with the normal function of a government agency. Trans-Tel Corporation, 33 F.C.C.2d 840 (1972).

41. Underbrush II at p. 1055.

42. Id.

43. Id.

44. Underbrush II at 1055. Initially adopted in 1975, Subscription Agreements, 56 F.C.C.2d 805, the policy never actually went into effect due to the filings of petitions for reconsideration. In the instant proceeding, the FCC granted the petitions and decided against implementing the policy.

45. Underbrush II at 1057.

46. This policy came about when a station, calling attention to its new format, played a single record for 69 hours. The FCC at the time questioned whether the licensee was subordinating its public interest obligations to private promotional purposes. GCC Communications of Houston, Inc., 40 F.C.C.2d 1154 (1973). The policy was listed at Section 73.4150 of the Commission's rules, 47 C.F.R. Section 73.4150 (1983).

47. Underbrush II at 1057.

48. This policy was adopted in 1968 in the case of Congressman John E. Moss, 13 F.C.C.2d 964. The policy was listed at section 73.4200 of the Commission's rules, 47 C.F.R. Section 73.4200 (1983).

49. Underbrush II at 1058.

50. Id. at 1059.

51. Announcement--Sound Effects, 26 F.C.C.2d 275 (1970). This policy was noted at Section 73.4240 of the Commission's Rules, 47 C.F.R. Section 73.4240 (1983).

52. Underbrush II at 1059.

53. Elimination of Unnecessary Broadcast Regulation, 56 R.R.2d 976 (1984) (hereinafter cited as Underbrush III). These policies were adopted in response to an Act of Congress designed to prevent organized crime interests from using interstate wire facilities. The three policies are Horse Racing Information Broadcasts, established in Horse Racing Information, 36 FCC 1571 (1964) and noted at Section 73.4125; Horse Racing Information and SCA Transmissions, established in Street Broadcasting Corp., 72 FCC2d 793 (1979) and noted at Section 73.4126; and Horse Racing; Off-track and Pari-mutual Advertising, established in Horse Race Information, 32 FCC2d 705 (1971), 41 FCC2d 172 (1973), 41 FCC2d 893 (1973) and found at Section 73.4130 of the Commission's rules, 47 C.F.R. Section 73.4130.

54. Underbrush III at 982-84.

55. Elimination of Unnecessary Broadcast Regulation, 57 R.R.2d 913 (1985), (hereinafter referred to as Underbrush IV).

56. This policy was established in 1977 in response to reports that stations had obtained diaries or paid recipients to make false entries into diaries. Distortions of Ratings, 65 FCC2d 413 (1977), noted at Section 73.4040 of the Commission's Rules, 47 C.F.R. Section 73.4040.

57. Underbrush IV 916-17.

58. This policy was first announced in 1966 in Crowell-Collier Broadcasting, 14 FCC2d 358 (1966). It was listed at Section 73.4085 of the Commission's rules, 47 C.F.R. Section 73.4085 (1985).

59. 47 U.S.C. Sections 507 and 317 (1988).

60. Underbrush IV at 918-19.

61. Report and Order in Docket 19773, 48 FCC2d 235 (1974), 47 C.F.R. Section 73.4245 (1985).

62. Underbrush IV at 919.

63. This policy arose in the cases of Carolinas Advertising, 42 FCC2d 1027 (1973) and Station WJIM-TV, 14 FCC2d 239 (1968) and was listed at Section 73.4225 of the Commission's rules, 47 C.F.R. Section 73.4225 (1985).

64. Underbrush IV at 920.

65. Id. at 920-21. This policy, which cautioned against such activity as offering discounts for advertisers who also purchased ad in co-owned newspapers, was created in response to two specific complaints, Sarkes Tarzian, 23 FCC2d 221 (1970), and WFLI, 13 FCC2d 846 (1967). The policy was noted at Section 73.4225 of the Commission's rules, 47 C.F.R. Section 73.4225 (1985).

66. This policy was adopted in response to complaints against Waterman Broadcasting Corp. of Texas, 28 FCC2d 348 (1970) and Doubleday Broadcasting Co., 55 FCC2d 763 (1975).

67. Underbrush IV at 922.

68. This policy was adopted in 1973 in Performance of Sales Contracts, 43 FCC2d 978 and was found at 47 C.F.R. Section 73.1205 (1985).

69. Underbrush IV at 922.

70. This policy stemmed from statements made in the 1960 Programming Inquiry, 44 FCC 2303 (1960), and was further developed in a 1981 public notice, 74 FCC2d 626. The policy was noted at Section 73.4070 of the Commission's rules, 47 C.F.R. Section 73.4070 (1985).

71. Underbrush IV at 924-25.

72. Elimination of Unnecessary Broadcast Regulation, 57 R.R.2d 939 (1985) (hereinafter cited as Underbrush V).

73. This policy was created in 1966 in response to complaints against station promotions--such as treasure hunts--that created public disturbances. Contests and Promotions Which Adversely Affect the Public INterest, 2 FCC2d 464. The policy was cited at 47 C.F.R. Section 73.1216 (1985).

74. Underbrush V at 941-42.

75. Elimination of Unnecessary Broadcast Regulation, 59 R.R.2d 1500 (1986) (hereinafter cited as Underbrush VI).

76. This policy was developed in Applicability of Fraudulent Billing Rule, 1FCC2d 1068 (1966) and was found at Section 73.1205 of the FCC's rules, 47 C.F.R. Section 73.1205 (1985).

77. Underbrush VI at 1507.

78. Id. at 1506-07.

79. These policies were first developed in a brief 1963 Policy Statement, Combination Advertising Rates, 45 FCC 581, and were further developed in several additional proceedings. See Underbrush VI at 1511, n. 15.

80. Specifically, the policy stated that a) separately owned stations in the same service area could not offer combination ad rates; b) commonly owned radio and TV stations in the same service area could not offer combination ad rates; c) commonly owned AM and FM stations in the same service area could offer combination ad rates if separate rates also were available and the combination rates did not result in an unfair advantage over other stations; and, d) sales representatives could not sell time in combination for separately owned stations.

81. Underbrush VI at 1514-17.

82. See the text accompanying note 46-47, supra.

83. See the text accompanying notes 36-38, supra.

84. See the text accompanying notes 48-49, supra.

85. See the text accompanying notes 44-45, supra.

86. See generally Character Qualifications, 102 FCC2d 1179 (1985).

87. See the text accompanying notes 68-69, supra.

88. See the text accompanying notes 61-62, supra.

89. See the text accompanying notes 66-67, supra.

90. Character Qualifications, 102 FCC2d at 1200-1203.

91. See text accompanying notes 79-81, supra.

92. See the text accompanying notes 58-60 and 63-65, supra.

93. See the text accompanying notes 28-29, supra.

94. See the text accompanying notes 75-78, supra.

95. See the text accompanying notes 23-27 and 55-56, supra. The first policy covers the use of ratings data in a misleading way. The second policy covers actual distortion of ratings by furnishing false information to ratings services or by improperly influencing the recipients of survey diaries.

The FCC's policy on false, misleading, and fraudulent advertising, while dealing with fraud, is analyzed later in this study.

96. Most of the statutory sources used in this study are located in the states' penal codes. Unless noted otherwise, these statutes were drawn from the following sources. California statutes are taken from West's Annotated Penal Code (1988), hereinafter cited West. Cal. Penal Code. Florida statutes are codified in West's Florida Statutes Annotated (1976), hereinafter cited as F.S.A. Indiana statutes in the Indiana Code (1988) are cited I.C. New York laws are found in the New York Penal Law (McKinney 1987), hereinafter cited as N.Y. Penal Law. Texas laws are listed in Vernon's Texas Codes Annotated (1974), hereinafter cited as V.T.C.A. Penal Code.

97. See West Cal. Penal Code Section 484, Theft; F.S.A. Section 812.014, Theft; I.C. 35-43-4-2, Theft; N.Y. Penal Law Section 155.05, Larceny; and V.T.C.A. Penal Code Section 31.03, Theft.

98. West. Cal. Penal Code Section 484. As interpreted by the California courts, theft by false pretenses consists of the making of a false representation by the accused, the intent to defraud the owner of the property, and actual reliance by the owner on the false pretense. People v. Fujita, 117 Cal. Rptr.

757, 43 C.A.3d 454 (1974), cert. denied, 421 U.S. 964 (1975).

99. N.Y. Penal Law Section 155.05(a). The New York courts have listed the following elements of larceny by false pretenses: an intent to deprive the owner of property; making false representations of existing facts, knowing that the representations are false; and obtaining the property of another as induced by the misrepresentation. People v. Chaitin, 94 A.D.2d 705, 492 N.Y.S.2d 61, aff'd 61 N.Y.2d 683, 472 N.Y.S.2d 597 (1983).

For similar holdings in other jurisdictions see State v. Oates, 330 So.2d 554 (Fla. Ct. App. 1976); Coburn v. State, 461 N.E.2d 1154 (Ind. 1984).

100. F.S.A. Section 817.034(a).

101. In all five states the severity for committing theft or larceny varies depending on the value of the money or property obtained. For example, the Texas statute defines the theft of up to $750 as a misdemeanor; anything over $750 is defined as a felony. V.T.C.A. Penal Code Section 31.03(e). New York lists"petite larceny", a misdemeanor, as larceny involving less than $1000. N.Y. Penal Law Section 155.25. Various degrees of grand larceny, a felony, covers larceny in amounts over $1000. N.Y. Penal Law Section 155.30.

102. In fact, it is probable that the other three states have similar statutes, although not listed in their penal codes. Such statutes may be included in commercial codes and business practices codes, neither of which was consulted in this study.

103. I.C. 35-43-5-3. This provision also covers the sale and delivery of less than the represented quality or quantity of any commodity. Presumably, this provision would cover activities described in the network clipping and coverage map policies.

104. V.T.C.A. Penal Code Section 32.42.

105. See the text accompanying notes 39-43, supra.

106. See the text accompanying notes 50-52, supra.

107. See the text accompanying notes 72-74, supra.

108. West. Cal. Penal Code Section 653m. The Indiana provision, which is typical, states that a person who, with an intent to harass, annoy, or alarm another person, but with no intent of legitimate communication, makes a telephone call, whether or not a conversation ensues, commits harassment, a Class B misdemeanor. I.C. 35-45-2-2.

109. This does not take into account whether a licensee could be held accountable under aiding and abetting or conspiracy statutes.

110. F.S.A. Section 365.16(c); V.T.C.A. Penal Code Section 42.07(a)(4).

111. N.Y. Penal Law Section 240.25. "Aggravated Harassment" occurs whenever, with intent to harass, annoy, or alarm, someone communicates with a person by telephone in a manner likely to cause annoyance or alarm or makes a telephone call with no purpose of legitimate communication. N.Y. Penal Law Section 240.30. This section could only be applied to the maker of such a call.

112. See West. Cal. Penal Code Sections 148.3 and 148.4; F.S.A. Section 806.101; I.C. 35-44-2-2; N.Y. Penal Law Section 240.50; and V.T.C.A. Penal Code Section 42.06. The Texas law raises the severity of the crime to a felony if the false report is about an emergency involving public communication, public transportation, the public water, gas or power supply, or any other public service. Section 42.06(b). Additionally, the California statute states that if bodily injury or death is sustained as a result of the false alarm, the crime becomes a felony. Sections 148.3 and 148.4.

113. See, e.g., Weirum v. RKO General, Inc., 15 Cal.3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975). This case was brought against a radio station conducting a contest to see who could first locate a hiding disc jockey. While racing to find the D.J., two contestants caused a fatal traffic accident. In the civil action resulting, the station was found guilty of negligence.

114. See West. Cal. Penal Code Sections 270, 372, 415; F.S.A. Section 877.03; I.C. 35-45-1-3; N.Y. Penal Law Sections 240.20, 240.45; V.T.C.A. Penal Code Section 42.01.

115. Id.

116. See text accompanying notes 31-32, supra.

117. See the text accompanying notes 53-54, supra.

118. See the text accompanying notes 70-71 and 33-35, supra.

119. See, e.g., N.Y. Alcoholic Beverage Control Law (McKinney 1987); V.C.T.A. Alcoholic Beverage Code (1978).

120. State Alcoholic Beverage Control Board regulations were not studied in the course of this research. It is possible that the broadcast of advertisements for certain kinds of alcoholic beverages could violate state regulations.

It must also be noted that at least one federal court has upheld a complete legislative ban on the advertising of alcoholic beverages, even where the sale of such products is legal. Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983), cert. denied, 104 S.Ct. 3553 (1984).

121. See West. Cal. Penal Code Section 337i; F.S.A. Section 550.35 (1)(b); V.C.T.A. Penal Code Section 47.05. The Florida statute makes it unlawful to transmit racing information when the information knowingly is used or intended to be used for illegal gambling purposes, or in furtherance of such illegal gambling.

122. See F.S.A. Section 550.35 (1)(a); I.C. 35-45-5-4.

123. Id.

124. This includes the policy against broadcasting astrology information, which the FCC stated raised claims of false or misleading advertising claims. Presumably, absent claims about false or misleading advertising, there is nothing inherent in the broadcast of astrology information that would lead to a criminal conviction. Thus, the astrology policy will not be further considered separately.

However, in the grand tradition of students studying the law I have come up with one completely ridiculous hypothetical whereby the broadcast of astrology information could lead to state prosecution. The Indiana Criminal Code has a provision which states that a person who intentionally causes another human being, by force, duress, or deception, to commit suicide commits "causing suicide", a class B felony. I.C. 35-42-1-2. A broadcaster airing astrology material (for example, prognostications of impending bad fortune or rain in the forecast) knowing that the material, if heard, would cause someone to commit suicide, could be grounds for prosecution under this statute.

125. See West. Cal. Bus. & Prof. Code Section 17500 (1974); F.S.A. Section 817.41; I.C. 35-43-5-3; N.Y. Penal Law Section 190.20; V.T.C.A. Bus. & C. Code Section 17.12 (1987). All of these statutes classify fraudulent, misleading, or deceptive advertising as a misdemeanor.

126. West. Cal. Bus. & Prof. Code Section 17502; F.S.A. Section 817.43; V.T.C.A. Bus. & C. Code Section 17.49. Another part of the Texas Code makes the false advertising of food, drug, and cosmetic products unlawful; however, the exemption for unknowing broadcast of such advertisements only applies if the licensee agrees to provide the name and address of the advertiser. Vernon's Ann. Civ. Stat. Article 4476-5 (1976).

127. See generally, the text accompanying notes 4-15, supra.

128. Character Qualifications, 102 FCC2d at 1196.

129. Id. at 1197.

130. See the text accompanying notes 93-101, supra.

131. See Character Qualifications at 1196-97.

132. Id. Presumably, however, the Commission would take into consideration the severity of the crime when determining whether an applicant was qualified to be a licensee.

133. See the text accompanying notes 102-104, supra.

134. See Character Qualifications at 1196-97.

135. See the text accompanying notes 121-123, supra.

136. Character Qualifications at 1197.

137. F.S.A. Section 550.35; I.C. 35-45-5-4; V.C.T.A. Penal Code Section 47.05.

138. The FCC states that the burden of proving that a substantial relationship exists shall be on the party seeking the admission of such evidence. Character Qualifications at 1197.

139. In fact, the Commission has stated that administrative or judicial findings of deceptive advertising would be considered FCC-related misconduct for character purposes. Character Qualifications at 1213-14.

140. See Uniform Policy on the Violations of Law of the U.S. by Station Applicants, 42 FCC 349 (1951). The Commission implicitly admits that such considerations rarely if ever led to actual disqualification of a licensee. Instead, character considerations merely served to lengthen the licensing process, making it more expensive for all parties. See Character Qualifications at 1180-81, 1194-95.

141. Again, this does not take into consideration the fact that several of the deleted policies address activities that might be found to violate state and federal antitrust and anticompetition statutes.

142. Omnibus Budget Reconciliation Act of 1981, Section 1241(a).